

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**AUG 21 2006**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HECTOR ZUNIGA,

Defendant - Appellant.

No. 05-30480

D.C. No. CR-03-16-RFC(2)

MEMORANDUM\*

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

Appeal from the United States District Court  
for the District of Montana  
Richard F. Cebull, District Judge, Presiding

Argued and Submitted July 25, 2006  
Portland, Oregon

Before: REINHARDT and GRABER, Circuit Judges, and LEW, \*\* District Judge.

Defendant Hector Zuniga was convicted by a federal jury of one count of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 846. The district court sentenced him to 168 months in prison.

1. Defendant first argues that the district court erred in failing to give a limiting instruction regarding admission of “other-crimes” evidence. We review

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit R. 36-3.

the admission or exclusion of evidence for an abuse of discretion. United States v. Danielson, 325 F.3d 1054, 1075 (9th Cir. 2003); see also United States v. Plancarte-Alvarez, 366 F.3d 1058, 1062 (9th Cir. 2004), amended, 449 F.3d 1059 (9th Cir. 2006). Whether evidence constitutes “other-crimes” within the meaning of Federal Rules of Evidence, Rule 404(b) is a question of law which we review de novo. United States v. Soliman, 813 F.2d 277, 278 (9th Cir. 1987); see also United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir. 1993).

We conclude that the evidence of Defendant’s conduct occurring after April 13, 2003 was properly admitted by the district court as inextricably intertwined with the underlying conspiracy to distribute methamphetamine. In admitting this evidence, the district court exercised its discretion by weighing the evidence’s probative value and prejudicial effects pursuant to Federal Rule of Evidence 403. See United States v. Lillard, 354 F.3d 850, 855 (9th Cir. 2003). We find no abuse of discretion. Because the post-April 13, 2003 evidence was not admitted under Federal Rule of Evidence 404(b), a limiting instruction was not required.

We also conclude that any post-April 13, 2003 evidence not admitted as inextricably intertwined was harmless error. The government has demonstrated that the verdict was not substantially swayed by the admission of such evidence.

The jury's verdict is limited to 842.2 grams of a mixture of methamphetamine - an amount equal to that seized by law enforcement in Montana prior to the conspiracy's end.

2. Defendant argues that he was denied a fair trial because of statements made during the prosecutor's summation. We review claims of prosecutorial misconduct for plain error when the defendant did not object at trial. United States v. Tam, 240 F.3d 797, 802 (9th Cir. 2001).

The prosecutor's statements in closing argument presented reasonable inferences from the facts in evidence. Additionally, even if the prosecutor's statements were deemed improper, the error would be harmless since the jury's ability to weigh the evidence impartially was not materially affected by the prosecutor's remarks. See United States v. Polizzi, 801 F.2d 1543, 1558 (9th Cir. 1986). Therefore, the inclusion of these statements does not constitute plain error.

3. Defendant argues that the prosecutor elicited testimony in violation of the district court's pretrial order. We disagree. The district court's order only excluded the *actual* audiotapes of the April 2003 recorded conversations. It did not broadly exclude all testimony concerning the events that took place on or during the wire-tapped conversations.

4. Defendant brings a claim for ineffective assistance of counsel on direct appeal. We do not reach that claim.

Ineffective assistance of counsel claims are generally inappropriate on direct appeal. United States v. Ross, 206 F.3d 896, 900 (9th Cir. 2000). The proper venue to bring such an action is during a habeas corpus proceeding as it “permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted.” United States v. Pope, 841 F.2d 954, 958 (9th Cir. 1988). Ineffective assistance claims may nevertheless be reviewed on direct appeal in two circumstances: “(1) when the record on appeal is sufficiently developed to permit review and determination of the issue, or (2) when the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel.” United States v. Robinson, 967 F.2d 287, 290 (9th Cir. 1992) (internal citations omitted). Defendant’s direct appeal does not sufficiently demonstrate an adequate record from which an ineffective assistance of counsel claim can be determined.

5. Defendant argues that the district court erred when it overruled his hearsay objections to the testimony of the government agents regarding statements credited to the informant. We review for abuse of discretion admission of evidence over hearsay objection. United States v. Cowley, 720 F.2d 1037, 1040 (9th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984). The district court did not abuse its discretion when it overruled the hearsay objections.

Any statements made by Defendant to the informant are non-hearsay pursuant to Federal Rule of Evidence 801(d)(2). Additionally, the informant's handing over of the bindles to the agents is not hearsay, but rather conduct. Finally, admission of this testimony falls within the district court's discretion to allow law enforcement agents to testify as to statements made by their informants in order to explain why the agents conducted the investigation as they did. See United States v. Cawley, 630 F.2d 1345, 1350 (9th Cir. 1980) (collecting cases).

6. Defendant argues that the Government improperly expanded the indictment and allowed him to be convicted based on uncharged acts. He also argues that the Government's amendment of the "to convict" jury instruction allowed for venue in the state of Washington.

We reject these contentions. The district court did not expand the August 22, 2003 indictment either by amendment or variance. Venue in Montana was proper as venue lies where the conspiracy was formed or where an overt act in furtherance of the conspiracy was performed. Hyde v. United States, 225 U.S. 347 (1912). In United States v. Williams, 536 F.2d 810 (9th Cir. 1976), *cert. denied*, 429 U.S. 839 (1976), the court clarified that venue is proper wherever any overt act occurred.

The evidence at trial sufficiently showed that Defendant formed a conspiracy to distribute methamphetamine in Montana, including substantial steps

taken in Montana by a co-conspirator. Specifically, Defendant's conviction was based upon an amount of methamphetamine equal to that provided by Defendant to his co-conspirator, which was subsequently seized by law enforcement in Montana.

7. Defendant argues that cumulative error warrants reversal of his conviction. We hold that reversal is not warranted on this basis.

8. Defendant challenges several considerations made regarding his 168 month prison sentence. We defer issuing a disposition on the sentencing issues pending issuance of the mandate in United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006) (per curiam).

For the foregoing reasons, the district court's jury verdict of guilty must not be disturbed.

AFFIRMED in part, DEFERRED in part.